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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 691

RALPH NEILL, ET AL., *Appellants*

vs.

ROBERT J. COOK, ET AL., *Appellees*

Appeal From The Supreme Court of Texas

Statement as to Jurisdiction

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. .....

RALPH NEILL, ET AL, *Appellants*

vs.

ROBERT J. COOK, ET AL, *Appellees*

Appeal From The Supreme Court of Texas

Statement as to Jurisdiction

Appellants Ralph Neill, et al. submit herewith their statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of Texas in Cause No. A-9579, refusing an application for a writ of error, no reversible error, thereby affirming the judgment of the Court of Civil Appeals, Eleventh Supreme Judicial District, Eastland, Texas, in Cause No. 3781, Ralph Neill, et al v. Robert J. Cook, et al.

THE OPINION BELOW

The order of the Supreme Court of Texas appealed from has not been and will not be published. A copy of such order is attached hereto as Appendix "A". The Court of Civil Appeals opinion affirmed by the order of the Supreme Court of Texas is reported under the following style and citation: *Ralph Neill, et al v.*

Robert J. Cook, et al., 365 S.W. 2d 824 (Tex. Civ. App., 1963, writ ref. n.r.e.).

JURISDICTION

1. This is an appeal from a decision of the Supreme Court of Texas refusing an application for a writ of error, no reversible error, thereby affirming the judgment of the Court of Civil Appeals, Eleventh Supreme Judicial District, Eastland, Texas, holding valid the "annexation" of the Gay Hill Common Consolidated School District No. 6 of Howard County, Texas, and Center Point Common School District No. 7 of Howard County, Texas, to the Big Spring Independent School District of Howard County, Texas.

2. The Supreme Court of Texas rendered its decision on July 10, 1963. Appellants' Motion for rehearing was overruled on July 31, 1963. Notices of appeal to this Court were filed by appellants with the Clerk of the Supreme Court of Texas and the Clerk of the Court of Civil Appeals, Eleventh Supreme Judicial District, Eastland, Texas, on October 28, 1963.

3. The jurisdiction of this Court upon appeal is conferred by 28 U.S.C.A. § 1257 (2) and 42 U.S.C.A. § 1983. Appellants challenge the validity of orders passed by the County Board of School Trustees of Howard County, Texas, "statute(s) of any state" within the meaning of 28 U.S.C.A. § 1257 (2), on the ground that, as applied to them, the orders are repugnant to the Constitution of the United States, and the decision of the highest court of the state was in favor of their validity. Appellants also challenge the valid-

ity of Article 2922a V.A.T.C.S., a "statute of any state" within the meaning of 28 U.S.C.A. § 1257 (2) on the ground that, as applied to them, it is repugnant to the Constitution of the United States, and the decision of the highest Court of the State was in favor of its validity.

In the event this Honorable Court should hold that this appeal is improvidently taken or inappropriate for some reason, appellants request that their appeal be considered as a petition for writ of certiorari under the provisions of 28 U.S.C.A. § 2103, for which writ this Honorable Court has jurisdiction under the provisions of Title 28 U.S.C.A. § 1257 (3).

4. Cases believed to sustain the jurisdiction of this Court on appeal.

(a) As to the orders passed by the County Board of School Trustees herein complained of being "statute(s) of any state" which the Supreme Court has jurisdiction to review on appeal, the following cases are believed to be in point: *Zucht v. King*, 260 U.S. 174, 43 Sup. Ct. 24, 67 L. Ed. 194 (1922); *John P. King Mfg. Co. v. City Council of Augusta, Ga.*, 277 U.S. 100, 48 Sup. Ct. 489, 72 L. Ed. 801 (1927); *Lake Erie & Western Railroad Co. v. State Public Utilities Commission of Illinois ex rel. J. S. Cameron*, 249 U.S. 422, 39 Sup. Ct. 345, 63 L. Ed 684 (1918); *Jamison v. State of Texas*, 318 U.S. 413, 63 Sup. St. 669, 87 L. Ed. 869 (1942).

(b) As to a "statute of any state" herein complained of (Article 2922a V.A.T.C.S.) which the Su-

preme Court of the United States has jurisdiction to review on appeal, the following cases are believed to be in point: *Metlakatla Indian Community v. Egan*, 363 U.S. 555, 80 Sup. Ct. 1321, 4 L. Ed. 2d 1394 (1960); *Marcus v. Search Warrant of Property at 104 East Tenth Street, Kansas City, Mo. et al*, 367 U.S. 717, 81 Sup. Ct. 1708, 6 L. Ed. 2d 1127 (1961); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 42 Sup. Ct. 106, 66 L. Ed. 239 (1921).

(c) As to jurisdiction of the Supreme Court to consider an appeal as a petition for writ of certiorari under 28 U.S.C.A. § 2103, the following cases are believed to be in point: *Com. of Pa. v. Board of Directors of City Trusts of City of Philadelphia*, 353 U.S. 230, 77 Sup. Ct. 806, 1 L. Ed. 2d 792, (1959), reh. den. 353 U.S. 989, 77 Sup. Ct. 1281, 1 L. Ed 2d 1146; *May v. Anderson*, 345 U.S. 528, 73 Sup. Ct. 840, 97 L. Ed. 1221 (1952); *Rohr Aircraft Corporation v. County of San Diego*, 362 U.S. 628, 80 Sup. Ct. 1050, 4 L. Ed. 2d 1002 (1960).

5. Copies of the orders passed by the County Board of School Trustees of Howard County, Texas, on May 4, 1960, the "statute(s) of any state" within the meaning of 28 U.S.C.A. § 1257 (2) challenged on this appeal are attached hereto as Appendix "B". They are not officially reported.

(a) The first of these orders pertaining to Center Point Common School District No. 7 provides in material part as follows:

> "THEREFORE, BE IT ORDERED by the County School Trustees of Howard County, State

of Texas, that the Center Point Common School District No. 7 be and it is hereby annexed to the Big Spring Independent School District under the provisions of Articles 2922a ET SEQ., Vernon's Texas Civil Statutes (Acts 1925, 39th Leg., p. 204, ch. 59, as amended), and that the name of the school district formed thereby shall be Big Spring Independent School District."

(b) The second order passed by the County Board of School Trustees on May 4, 1960, provides in material part as follows:

"THEREFORE, BE IT ORDERED BY The County School Trustees of Howard County, State of Texas, that the Gay Hill Common Consolidated School District No. 6 be and it is hereby annexed to the Big Spring Independent School District under the provisions of Articles 2922a ET SEQ., Vernon's Texas Civil Statutes (Acts 1925, 39th Leg., p. 204, ch. 59, as amended), and that the name of the school district formed thereby shall be Big Spring Independent School District."

(c) By a third order passed on May 4, 1960, the County Board of School Trustees defined the boundaries of the Big Spring Independent School District incorporating therein the area of the annexed Districts.

(d) Article 2922a V.A.T.C.S., the authority cited as sustaining the jurisdiction of the County Board to annex the School Districts in question, provides as follows:

"ART. 2922a. AUTHORITY TO ESTABLISH. In each organized county in this state, and in any county which shall hereafter be organized, the

county school trustees shall have the authority to form one or more rural high school districts, by grouping contiguous common school districts having less than four hunderd (400) scholastic population and independent school districts having less than two hundred fifty (250) scholastic population, for the purpose of establishing and operating rural high schools; provided, also, that the county school trustees may annex one or more common school districts or one or more independent school districts having less than two hundred fifty (250) scholastic population, to a common school district having four hundred (400) or more scholastic population, or to an independent district having two hundred [illegible] (250) or more scholastic population. Provided, that the county school trustees shall have the authority to abolish a rural high school district on a petition signed by a majority of the voters of each elementary school district composing the rural high school district, and when such district has been abolished the elementary districts shall automatically revert back to their original status, with the exception that in the event there are any outstanding indebtednesses against the said rural school district each elementary district shall assume its proportional part of the debts, bonded or otherwise. Acts 1925, 39th Leg., p. 294, ch. 59; Acts 1927, 40th Leg., 1st C.S., p. 206, ch. 78, § 1; Acts 1947, 50th Leg., p. 798, ch. 398, § 1."

This Statute appears in Volume 8 of Vernon's Annotated Texas Civil Statutes at page 1133.

(e) The orders referred to above also recited as authority the articles following Article 2922a, pre-

sumably the following:

> "ART. 2922b. HOW CLASSED. Rural high school districts as provided for in the preceding article shall be classed as common school districts, and all other districts, whether common or independent, composing such rural high school district shall be referred to in this Act as elementary school districts; provided that all independent school districts enlarged by the annexation thereto of one or more common school districts, as provided for in Article 2922a shall retain its status and name as an independent school district, and shall continue to operate as an independent school district under the provisions of the existing laws and the laws hereafter enacted governing other independent school districts, except as otherwise provided for herein."

This Statute appears in Volume 8 of Vernon's Annotated Texas Civil Statutes at page 1146.

> "ART. 2922c. AREA. No rural high school district, as provided for herein, shall contain a greater area than one hundred square miles, or more than ten elementary school districts, except that the county school board of school trustees may form rural high school districts, as provided in Article 2922a, containing more than one hundred square miles, upon a vote of a majority of the qualified electors in the said proposed rural high school district voting at an election called for such purpose; and provided further, that the said board of county school trustees may form a rural high school district containing more than ten elementary districts upon a vote of a majority of the qualified voters in each of the elementary districts within such proposed rural high

school district. As amended Acts 1947, 50th Leg., p. 798, ch. 398, § 2."

This Statute appears in Volume 8, V.A.T.C.S. at page 1148.

6. Questions presented by this appeal are as follows:

(a) Whether the County Board of School Trustees of Howard County, Texas, deprived appellants and all others similarly situated of their property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution when said County Board of School Trustees by summary, exparte orders combined the school districts in which appellants reside with the Big Spring Independent School District thereby subjecting appellants' property to greater tax burdens and bonded indebtedness.

(b) Whether the County Board of School Trustees of Howard County, Texas, denied due process of law to appellants and all others similarly situated in combining the school districts in which appellants reside with the Big Spring Independent School District without holding an election as required by Article 2806, or Article 2922c, or Article 2815 V.A.T.C.S., thereby abridging appellants' privilege of franchise in contravention of the Fifth and Fourteenth Amendments to the United States Constitution.

(c) Whether the acts of the County Board of School Trustees of Howard County, Texas, in combining the school districts in which appellants reside with the Big Spring Independent School District were so arbitrary, capricious and lacking in fundamental quali-

ties of fair play and representative government as to amount to a denial of due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

(d) Whether the County Board of School Trustees of Howard County, Texas, acting under authority of statutes of the State of Texas, and whose action was affirmed by the Court of Civil Appeals and the Texas Supreme Court deprived appellants and all others similarly situated of rights, privileges and immunities secured by the Fifth and Fourteenth Amendments to the Constitution of the United States and thereby infringed rights of the appellants protected by Title 42, Section 1983, U.S.C.A.

(e) Whether the holding of the Court of Civil Appeals as affirmed by the Supreme Court of Texas that a consolidated common school district is included within those districts named in Article 2922a discriminates against the Gay Hill Common Consolidated School District and deprives it of equal protection of the laws guaranteed it and its constituents by the Fifth and Fourteenth Amendments to the United States Constitution.

(f) Whether the holding of the Court of Civil Appeals made final by the refusal of the Supreme Court of Texas of an application for a writ of error that the annexations made by the County Board of School Trustees of Howard County, Texas, were authorized by Article 2922a, V.A.T.C.S. and not governed by Article 2806 and Article 2815, V.A.T.C.S. denies due process of law to appellants and all others simil-

arly situated guaranteed to them by the Fifth and Fourteenth Amendments to the United States Constitution.

(g) Whether the refusal by the Supreme Court of Texas to consider the constitutionality of Article 2922a et seq. as applied in this case to a subject beyond the legislative caption of said Article 2922a et seq. denies to appellants and all others similarly situated substantive and procedural due process afforded and guaranteed them by the Fifth and Fourteenth Amendments to the United States Constitution.

(h) Whether the refusal by the Supreme Court of Texas to grant the application of appellants for a writ of error denies appellants procedural due process afforded and guaranteed to them by the Fifth and Fourteenth Amendments to the United States Constitution.

(i) Whether the holding of the Court of Civil Appeals made final by the refusal by the Texas Supreme Court of an application for a writ of error that the order of the County Board of School Trustees of Howard County, Texas, annexing the Center Point Common School District and the Gay Hill Common Consolidated School District to the Big Spring Independent School District became final and could not be rescinded and that said County Board of School Trustees of Howard County, Texas, had no power to confess error in the passage of said order denies to appellants and all others similarly situated due process of law guaranteed them by the Fifth and Fourteenth Amendments to the United States Constitution.

7. STATEMENT OF THE CASE.

(a) General Statement of Facts Applicable to the Case.

Howard County is located in West Texas. Its largest city (population 31,230 in 1960) and county seat of government is the City of Big Spring, Texas.

Three school districts in Howard County, Texas, are litigants in this case. They are the Big Spring Independent School District whose average daily attendance was 6,051.14 scholastics (S.F. p. 605), and area was 109.68 square miles, (S.F. p. 35) the Center Point Common School District No. 7, whose average daily attendance was 83.95 scholastics (S.F. p. 155) and area was 41.50 square miles, (S.F. p. 35) and the Gay Hill Common Consolidated School District No. 6 whose average daily attendance was 88.78 (S.F. p. 151) scholastics and area was 96.16 square miles (S.F. p. 35). (Attendance figures quoted are for school year 1959-1960; area figures quoted are for the districts prior to the annexation on May 4, 1960.)

Geographically the Center Point Common School District lies immediately north and east of the Big Spring Independent School District. The Center Point School building is approximately 7 miles north and east of the City of Big Spring (S.F. p. 17).

The Gay Hill Common Consolidated School District lies immediately north of the Center Point Common School District. The Gay Hill School building is ap-

proximately 18 miles north and east of the City of Big Spring (S.F. p. 5).

Texas school law sets up many different categories of schools, viz: independent districts, rural districts, municipally controlled districts, county line districts, consolidated districts, common districts, and consolidated common districts, to name a few. Volume 8 of Vernon's Annotated Texas Civil Statutes contains this labyrinth of law which is further confused and perplexed by making the law applicable only to districts in the specified category or class which have a certain population.

Generally speaking, the management and control of the schools is vested by Statute in the Board of Trustees of each school district whether independent or common. The Big Spring Independent School District is governed by its Board of Trustees who are an independent body free from any control by the governing body of the City of Big Spring.

The Center Point District and Gay Hill District each operate through its Board of Trustees which has the management and control of the school within its district.

The County Board of School Trustees, a creature of Statute, is an administrative body granted certain powers to act generally in matters relating to the size and area of certain school districts within the County.

(b) The Nature of the Case.

On May 4, 1960, at a meeting of the County Board of School Trustees of Howard County, Texas, the

Board passed an order annexing the Center Point Common School District No. 7 of Howard County, Texas, to the Big Spring Independent School District of Howard County, Texas. By another order passed on the same day at the same meeting shortly after the order referred to above, the County Board annexed the Gay Hill Common Consolidated School District No. 6 of Howard County, Texas, to the Big Spring Independent School District also of Howard County, Texas. Both orders recited Articles 2922a V.A.T.C.S. et seq. as authority for the annexations. A third order was prepared by the County Board defining the boundaries of the Big Spring Independent School District as enlarged by the annexation pursuant to Article 2681 V.A.T.C.S. All of the orders were passed by a three to two vote, the Chairman of the County Board, Robert Jack Cook, casting his vote with the majority. (See Appendix "B", where the orders are printed).

The clandestine, covert purpose of this meeting was not made known to the taxpaying citizens or Boards of Trustees of either of the Districts so annexed (S.F. pp. 162, 463). In fact the purpose of the meeting was not even disclosed to the two members of the County Board who were known to oppose such action without the prior approval of the School Districts affected (S.F. pp. 321, 325, 399). Some of those who knew of the nefarious scheme in advance were Robert J. Cook, Chairman of the County Board, and Truman Jones and James Lewis, Trustees on the County Board (S.F. p. 211), and Harold Talbot, Trustee on the Board of Trustees of the Big Spring

Independent School District (S.F. p. 466). Robert J. Cook and Harold Talbot in private affairs were business partners in real estate and oil leasing (S.F. pp. 40, 465). They were in position to conspire to turn the decision in favor of the annexations. This in itself raises questions of improper influence and conflict of interest on the part of an administrative official, the Chairman of the Board, sufficient to disqualify him.

In addition, the Chairman of the Board, Cook, and Trustees, Truman Jones and James Lewis, were residents of Big Spring and of Big Spring Independent School District (S.F. pp. 40, 41). By adding the great oil wealth of the Gay Hill District to the Big Spring Independent School District, Big Spring Independent School District would have a tremendous increase in taxable values without any comparable or corresponding cost so that residents in the Big Spring Independent School District would stand to gain pecuniarily by the annexations. As a matter of law the Chairman and two Trustees of the Board should have disqualified themselves and not participated in the action taken by t he Board. Their participation in the matter resulted in the passage of the orders. These orders, passed with their votes, contaminated by the vice of self-interest, conflict of interest and possible improper influence, are permeated with the stench of gross impropriety and should be declared void ab initio and thrown out like rotten applies in a barrel.

The meeting of the County Board was not even held on its regular date! It was postponed for two days in order that the orders of annexation could be prepared for passage at the meeting (S.F. pp. 477, 478).

The taxpaying citizens and Boards of Trustees of the Districts annexed and those on the County Board who did not favor the annexations, *all* could have reasonably expected to have been advised of the annexations in advance of the action so taken because of prior assurances to the taxpayers and the Boards of Trustees and the customary way of handling controversial issues by the County Board itself (S.F. pp. 393, 400). The Chairman of the County Board at a public meeting in February of 1959 as spokesman for the County Board assured the residents of the Gay Hill District that there was no intention of annexing them and that no annexations would be had without notifying them in advance (S.F. pp. 45, 103, 393). These statements by the Chairman of the County Board were made at a meeting held to discuss a consolidation proposal of the Gay Hill Common School District with the Borden County Independent School Districts. The consolidation proposal was defeated (S.F. p. 134), and it is not unlikely that the assurances from the County Board at the meeting were decisive in affecting the result of the election.

As to the manner in which business was conducted by the County Board which affected "the Districts", or "was a real problem", it was the practice to bring these matters to the board members' attention prior to the meeting at which they were to be acted on (S.F. p. 400).

Laying aside for a moment the questionable participation by the Chairman and the two members of the County Board who resided in Big Spring, and the personal assurances of the County Board to the tax-

payers and Board of Trustees of the Gay Hill District and the departure of the County Board from its usual modus operandi in failing to notify its own Board Trustees of the agenda in advance, although these matters are substantial, appellants contend that the orders passed by the County Board of School Trustees without notice to them as taxpaying citizens and Boards of Trustees of Districts so annexed, which orders were passed without notice and opportunity for hearing or referendum election being called, constitute a taking of their property without due process of law and a denial of due process of law vouchsafed to them under the Fifth and Fourteenth Amendments to the United States Constitution.

Because of the annexations the property owned by appellants as individuals will be subjected to tremendous increases in taxes. This can best be shown by the valuations placed on property within the three districts in question as said valuations appeared on the State and County tax rolls (S.F. pp. 50, 51, 54, 122, 123, 124).

Center Point School District	
valuations: 1958-1959	$ 540,125.00
1959-1960	594,465.00
Gay Hill School District,	
valuations: 1958-1959	7,713,200.00
1959-1960	7,734,580.00
(These differing figures appear due	or
to a conflict in the testimony.)	7,034,585.00
Big Spring Independent School	
District valuations: 1958-1959	21,798,232.00
1959-1960	22,890,032.00

This certainly shows the value of the Gay Hill School District for tax purposes as compared to the value of the Big Spring Independent School District for tax purposes, the Gay Hill District having a valuation of approximately one-third of the Big Spring Independent School District value.

The method of valuation employed by the Big Spring Independent School District tax office results in a taxable valuation in this district two and one-half times as great as the value placed on the same property by the State and County tax office (S.F. pp. 51, 54, 269). For example, on January 1, 1960, the assessed valuation for the Big Spring Independent School District was $54,668,909.00 (S.F. p. 613). Yet for the same period, the same property on the tax roll of the State and County had a valuation of $22,-890,032.00 (S.F. p. 54).

To make the tax burden even heavier, the Big Spring Independent School District's percentage of assessment is sixty per cent of market value, whereas, in the Center Point and Gay Hill School Districts the percentage of assessment is twenty per cent of market value.

Taking as an example a person owning a $10,000.00 parcel of property in each of the Districts prior to the annexations, the assessed valuation of the property in the Big Spring Independent School District would be $6,000.00 which multiplied by its tax rate of $1.77 per hundred (S.F. p. 623) would result in a tax in this District of $106.20.. The property in the Center Point District would have an assessed valua-

tion of $2,000.00 which multiplied by the tax rate in this District of $2.20 per hundred (S.F. p. 155) would result in a tax of $44.00. The property in the Gay Hill District would have an assessed valuation of $2,000.00 which multiplied by the tax rate of $1.50 per hundred (S.F. p. 155) in this District would result in a tax of $30.00. These figures do not include any factor for the two and one-half times higher valuation in the Big Spring Independent School District over the valuations placed on the Districts by the State and County tax offices who assessed and collected taxes for the Center Point and Gay Hill Districts prior to annexation. These increases in taxation are substantial.

The bonded indebtedness for each of the schools for the year or years immediately preceding the annexation was as follows:

Center Point School District, (S.F. p. 125)	1958-1959	$ 48,200.00
	1959-1960	46,800.00
Gay Hill School District, (S.F. p. 125)	1958-1959	165,000.00
	1959-1960	150,000.00
Big Spring Independent School District on May 3, 1960 (S.F. p. 632)		3,458,600.00

The amount of cash and investments of the Center Point School District on May 3, 1960, was $7,297.30 (S.F. p. 126). The amount of cash and investments of the Gay Hill School District on May 3, 1960, was $141,086.35 (S.F. p. 126).

Appellants submit that these added tax burdens to them and their property are not offset by any corre-

sponding benefit. The record clearly shows that the Gay Hill Common Consolidated School District had one of the finest schools in the State of Texas for its size and received recognition for this achievement (S.F. pp. 132, 536). Counselling and nursing services were not furnished in this school, it is true, but it is at least a valid inference that in a small school where the students can be treated as individuals that the need for these services is minimal if not non-existent.

Appellants contend that the primary purpose of the annexation was to incorporate valuable oil rich property and some $140,000 in cash on deposit for the Gay Hill School District (S.F. p. 126) into the Big Spring Independent School District for the financial benefit of the Big Spring Independent School District and its patrons, and that benefit to the school children in the districts so annexed was secondary, if considered at all. (S.F. pp. 428, 429 and 638).

Some difference in quality of facilities and instruction was suggested in the trial court between the Center Point Common School District and the Gay Hill Consolidated Common School District with the inference that the Center Point School was lower in overall standards as compared to either the Gay Hill School or the Big Spring Schools (S.F. p. 536). Appellants submit that the only reason that the Center Point School District was annexed was that it was contiguous to the Gay Hill School District so that the Gay Hill School District could be annexed under the provisions of Article 2922a V.A.T.C.S. Appellants urge that the purpose of the annexation of Gay Hill

School District was due to its wealth because of producing oil properties therein and was the prize to be won for the Big Spring Independent School District.

The gross abuse of constitutional guaranties by the County Board of School Trustees whose motive and objective were so obvious did not go unchallenged.

(c) Trials and Appeals In the State Courts.

On May 9, 1960, suit was filed in the District Court of Howard County, Texas, 118th Judicial District, under the caption *Ralph Neill, et al v. Robert J. Cook, et al*, No. 12418, challenging the validity of the orders passed by the County Board of School Trustees. The plaintiffs in the suit, appellants here, were Ralph Neill, Joe Mangum and Howard Lloyd, individually and as Trustees of the Center Point Common School District No. 7, and Ulysses Hall, Jimmy Felts, Jack Buchannan, H. L. Moats, Weaver Brown, T. A. Norman and Jeff Painter, individually and as Trustees of the Gay Hill Common Consolidated School District No. 6 and complained of Robert J. Cook, Truman Jones, J. D. Gilmore, Fred Roman, and James G. Lewis as Trustees of the County School Trustees of Howard County, State of Texas, and Harold Talbot, Wendell Parks, Red Womack, Floyd Mayes, Mrs. R. B. G. Cowper, Clyde McMahon and Dan Krause as Trustees of Big Spring Independent School District. A few hours before this petition was filed a notice of appeal had been filed with the Secretary of the County School Trustees of Howard Coun-

ty and with the State Commissioner of Education challenging the validity of the orders passed by the County Board.

The defendants, appellees here, on May 13, 1960, filed a plea to the jurisdiction of the District Court alleging that an election had been made by the plaintiffs, appellants, to have the matter determined by the State Commissioner and Board of Education. The trial court sustained this plea to the jurisdiction. On appeal the Court of Civil Appeals reversed and remanded for a trial on the merits holding that the district court had exclusive jurisdiction to hear the case where the validity of the orders was challenged as being violative of the due process clauses of the State and Federal constitutions. *Neill v. Cook*, 340 S.W. 2d 315 (Tex. Civ. App. 1960). On appeal, the Supreme Court of Texas affirmed the judgment of the Court of Civil Appeals reversing the judgment of the trial court and remanding the case for a trial on the merits but did so on the ground that the plaintiffs, appellants here, did not make a binding election to pursue the administrative route in appealing the orders in question when they only gave notice of appeal which was not perfected but in effect withdrawn when the suit in the District Court was filed. *Cook v. Neill*, 352 S.W. 2d 258 (Tex. Sup. Ct. 1961).

On the 23rd day of July, 1962, the case was tried on the merits before a jury in the District Court of Howard County, Texas. After the jury deliberated and reached a verdict on some of the special issues submitted to them by the Court and announced they

were unable to reach agreement on the other issues, the Judge of the District Court discharged them and entered judgment on September 11, 1962, for the defendants, appellees, and against the plaintiffs, appellants, and thereby upheld the orders passed by the County Board of School Trustees (Transcript pp. 105-114).

While the appeal was pending in the Court of Civil Appeals, the County Board of School Trustees filed a resolution passed by them with the Court of Civil Appeals confessing error and requesting the Court of Civil Appeals to enter judgment for appellants setting aside the prior orders of the County Board of School Trustees annexing the Center Point Common School District and Gay Hill Common Consolidated School District to the Big Spring Independent School District. The Court of Civil Appeals held that the orders became final and could not be rescinded at a subsequent meeting, that the County School Board had no power to confess error where none existed and affirmed the judgment of the trial court in all respects. *Neill v. Cook*, 365 S.W. 2d 824 (Tex. Civ. App. 1963).

On July 10, 1963, the Texas Supreme Court refused an application for a writ of error, no reversible error. On July 31, 1963, the Texas Supreme Court overruled appellants' motion for rehearing on their application for a writ of error. Notices of appeal were filed with the Court of Civil Appeals and the Texas Supreme Court, the courts possessed of the record, on October 28, 1963.

Appellants, plaintiffs below, raised issues of denial of due process and lack of notice and opportunity to be heard in all of the pleadings filed in this case including their second amended original petition on which the case proceeded to trial (Tr. pp. 2-39), and motion for new trial filed in the trial court (Tr. pp. 115-124). The constitutional questions were preserved in the Court of Civil Appeals as reflected in its opinion *Neill v. Cook*, 365 S.W. 2d 824, at page 829 (Texas Civil Appeals 1962, writ refused, n.r.e.).

The constitutional questions were presented to the Texas Supreme Court in appellants' application for a writ of error which was refused and in appellants' motion for rehearing which was overruled. Appellants submit that the validity of the annexation orders and of Article 2922a et seq. V.A.T.C.S. pursuant to which they were passed were challenged as being repugnant to the Fifth and Fourteenth Amendments to the United States Constitution in the trial court, Court of Civil Appeals and Texas Supreme Court and although not having been specifically adjudicated by the Texas Supreme Court are before this Court on appeal.

8. THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

The right of persons to be notified and heard before decisions are made which affect them and their property is so basic to our system of government that it should be foremost in the minds of all who serve the public in any governmental capacity. The right to representation before taxation has been important in

America at least since December 16, 1773, when patriots dumped a cargo of tea in the Boston Harbor in protest of an import duty authorized by the British Crown.

Failure to observe basic individual rights denied to appellants and breach of public trust by public officials tainted with self interest as occurred in the instant case breeds contempt for officials wearing the mantle of governmental authority. Action taken by such officials could be characterized by many descriptive names and terms, the most complimentary of which might be that the action is "legal" although tainted with fraud. The engendering of disrespect and contempt for authority and its usual corollary of reliance on self-help and the fundamental rules of honesty and fairplay are in themselves sufficient reason why the Federal questions are substantial.

Due process of law is a term which is not easily defined. It depends upon all the facts and circumstances in a given case. It at least requires notice and opportunity to be heard in defense of the question. In the final analysis it boils down to a question of fair play.

The whole case is rather circumspectly stated in the testimony of Mr. Fred Roman and Mr. J. D. Gilmore, the members of the County Board of School Trustees who did not consent to the annexation. At the meeting at which the spurious orders were passed, Mr. Gilmore stated to Mr. Cook, the Chairman of the Board:

> "Mr. Cook, you understood our position on that, that I have no objection to them coming up

> here. But I don't think that it is democratic for this Board to go out there and get them because they have the authority without them knowing it. There is no part of a democracy in it, and I can't go along with you on that." S.F. p. 404.

One of the Trustees made the remark that if the patrons of the Districts affected were told about the annexation that they could "kill it" in thirty minutes. To this, Mr. Gilmore said:

> "If they can kill it then it isn't democratic, it shouldn't be gone over if it can't be done in the open, it shouldn't be done." S.F. p. 405.

Mr. Roman summed up his appraisal of the Board's action with the words:

> ". . . that was Hitler or Khrushchev business, I was a Democrat and I didn't believe in that way of doing business. I said, 'What you men are fixing to do is wrong in my book', and I asked them to table this thing. I said, 'I'm not saying to forget it, but table this proposition, let's go talk to the Gay Hill and Center Point people, call those people together, and if they want it I'll vote for it.' " (S.F. p. 326.)

And again when one of the other Board members said:

> " 'We'll tear up a big stink if we go out there and call a meeting.' " Mr. Roman said: " 'Brother, you think you haven't stirred up a stink if you go on and do this, you have got one, . . . it's going to leave a bitter taste in a lot of them people's mouths out there. And if you just go on

and pass this you are going to know it.'" (S.F. p. 327.)

The testimony of Mr. Ralph Neill, one of the appellants, plaintiffs below, indicated his view of the action of the County Board when he advised Mr. Harold Talbot, a member of the Board of Trustees of the Big Spring Independent School District, that in his opinion,

> ". . . it (the annexation(s)) was a dirty Irish trick." (S.F. p. 466.)

The County School Trustees Cook, Jones and Lewis lived in Big Spring. They had a conflict of interest. By adding the great oil wealth of the Gay Hill rural school district to the Big Spring Independent School District, they improved their own financial position. With such tremendous increase in taxable values without comparable cost their taxes would be less. To aggravate the conflict Mr. Cook was a business partner of one of the Trustees of the Big Spring Independent School District. This may account in part for the secrecy that surrounded the scheme to seize the districts, abolish them and appropriate their great wealth for Big Spring Independent School District. These three Trustees should have disqualified themselves and refused to vote. Instead they voted and put the secret plan into effect. Truly it can be said that this meeting was conceived in sin and the spurious progeny thereof was spawned in iniquity.

When new members of the County Board were elected they filed an instrument in the Court of Civil

Appeals confessing error and injustice and asked that the orders be set aside because of the manner in which they had been issued.

Appellants have challenged Article 2922a V.A.T.C.S. on the ground that it applies only to the grouping of Rural School Districts and is not applicable to enlarge an already large metropolitan independent school district, such as the Big Spring Independent School District. When applied to the facts in the instant controversy, it is furthermore invalid because it is beyond the scope of its legislative caption at the time of its passage in the Texas Legislature.

More importantly for this appeal Article 2922a has been challenged and is challenged here for the reason that said Article fails to require notice and opportunity for hearing for persons within the district or districts to be affected by the annexation and, therefore, denies due process of law to them. Article 2922a contains no guidelines to direct the County Board of School Trustees in taking action to annex districts, and is, therefore, an unconstitutional delegation of legislative and judicial power. For these reasons Article 2922a is void and the orders passed pursuant thereto are void since proceeding from an unconstitutional source. In the alternative plaintiffs urge that if Article 2922a should be held by implication to include limitations of reasonableness, to afford notice and opportunity for hearing to persons affected by the annexations, and action only for the benefit and best interest of the school children of the district or districts affected by the annexations and is, therefore,

constitutional, which appellants deny, then the orders, passed by the County Board of School Trustees are void since none of these implied limitations was considered in the passage of the orders complained of. The record on the other hand will affirmatively show that the orders were passed without notice and opportunity for hearing and that the purpose of the orders was to annex valuable properties to the Big Spring Independent School District without any corresponding benefit to the persons and school district within the area so annexed. Furthermore, the passage of such orders was so arbitrary, capricious, unfair and lacking in basic qualities of fair play and honorable dealings that it denied due process of law to appellants.

9. Authorities Controlling Questions Presented.

The questions raised by this appeal are believed to be controlled by the rules announced in the following cases:

(a) As to a statute being unconstitutional because conferring arbitrary power and containing no guidelines for its implementation, see *Yick Wo v. Hopkins*, 118 U.S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220 (1886); *A.L.A. Schechter Poultry Corporation v. U. S.* 295 U.S. 495, 55 Sup. Ct. 837, 79 L. Ed. 1570 (1935); *Gulf Refining Co. v. City of Dallas*, 10 S.W. 2d 151 (Tex. Civ. App. 1928, writ dismissed). Appellants urge that the mere listing of the size of the District to which Article 2922a V.A.T.C.S. is applicable is arbitrary because it completely overlooks the quality

of the schools and needs of the students in the Districts coming within its provisions.

(b) As to the question of appellants property being taken without due process of law where there was no notice or opportunity for hearing in an analogous fact situation see *County Board of School Trustees of Young County, et al v. Bullock Common School District No. 12, et al*, 37 S.W. 2d 829 (Tex. Civ. App. 1931), aff'd 55 S.W. 2d 538 (Com. of App. Texas 1932) where it is noted that

> ". . . a diminution of the territory of the Bullock School District, thus decreasing the district's financial ability, could not, without due notice and opportunity to be heard, be taken away under the due process clauses of the state and federal constitutions." 37 S.W. 2d 829, p. 832.

See also *Browning v. Hooper*, 269 U.S. 396, 46 Sup. Ct. 141, 70 L. Ed. 330 (1925); But see *Adkins v. Rogers*, 303 S.W. 2d 820 (Tex. Civ. App. 1957, error ref. n.r.e.).

(c) As to the County Board of School Trustees being an administrative body, see *State Line Consolidated School District No. 6 of Parmer County et al v. Farwell Independent School District et al*, 48 S.W. 2d 616 (Com. of App. Tex. 1932) where it is stated:

> ". . . we hold that the county board of trustees is an administrative body with certain defined powers and duties. It can only exercise such powers and perform such duties as are expressly defined by statute or necessarily implied there-

> from. As long as such board acts within lawful limitations its judgment and discretion can only be questioned by appeal to higher school authorities, but, when it goes outside its statutory limitations and acts without authority of law, its acts are void and may be questioned in a court action without the formality of an appeal to the higher school authorities." p. 617.

(d) As to an administrative body whose orders have deprived persons of their property without notice and opportunity for hearing and are therefore invalid because in contravention of the due process clauses of the State and Federal Constitutions, see *Highway Transp. Co. et al. v. Southwestern Greyhound Lines, Inc.*, 124 S.W. 2d 433 (Tex. Civ. App., error ref'd); *Morgan v. United States*, 304 U.S. 1, 58 Sup. Ct. 773, 82 L. Ed. 1129 (1937).

10. Conclusion

For the reasons stated and because of the gross abuse of constitutional guaranties as demonstrated by the facts stated herein practiced upon appellants by appellees, appellants submit that the questions raised herein are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution and an ultimate declaration from this Court that the orders herein complained of are void.

Respectfully submitted,

A. B. CULBERTSON
4235 E. Lancaster
Fort Worth, Texas

SIMON, CROWLEY, WRIGHT, RATLIFF AND MILLER AND WAYNE A. ROHNE
12th Floor Sinclair Building
Fort Worth, Texas 76102

By _____

Of Counsel for Attorneys for Ralph Neill et al, Appellants

PROOF OF SERVICE

I, Wayne A. Rohne, Attorney, of Counsel for Attorneys of Record for Ralph Neill et al, appellants, depose and say that on the 19th day of December, 1963, I served a copy of the foregoing statement as to jurisdiction on Robert J. Cook, et al, appellees herein by depositing same in the United States mail box with first class postage prepaid addressed to Counsel of Record at their post office addresses as follows: Guilford L. Jones, P. O. Box 668, Big Spring, Texas; J. C. Hinsley, 630 Littlefield Building, Austin, Texas, Attorneys for appellees.

Wayne A. Rohne

Wayne A. Rohne

SUBSCRIBED AND SWORN TO before me at Fort Worth, Texas, this 19th day of December, 1963.

Nell Mitchell

NELL MITCHELL, Notary Public in and for Tarrant County, Texas

Notary Public in and for Tarrant County, Texas

My Commission expires June 1, 1965

APPENDIX "A"

IN THE SUPREME COURT OF TEXAS
AUSTIN

******

July 10, 1963

No. A-9579
Relph Neill et al.
vs.
Robert J. Cook et al.
From Howard County, Eleventh District.

Application of petitioners for writ of error to the Court of Civil Appeals for the Eleventh Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicants, Ralph Neill et al. (named as appellants in the judgment of the Court of Civil Appeals), pay all costs incurred on this application.

******

July 31, 1963

No. A-9579
Ralph Neill et al.
vs.
Robert J. Cook et al.
From Howard County, Eleventh District.

Petitioners' motion for rehearing of application for writ of error having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

******

APPENDIX "B"

County Board Meeting, Wednesday, May 4, 1960

The Howard County Board of School Trustees met in regular session in the County Superintendent's office in the Courthouse in Big Spring, Texas on Wednesday, May 4, 1960, at 1:30 P.M. with the following members present: Robert J. Cook, Chairman, J. D. Gilmore, Fred Roman, James G. Lewis, Truman Jones, and Walker Bailey, County Superintendent and ex-officio secretary to the Board.

The following proceedings and resolutions were passed and adopted:

1. The minutes of the Regular meeting held on February 1, 1960, and the minutes of the Special meeting held on February 23, 1960, were read and approved.

2. All School Bus Routes in Howard County were tentatively approved to operate for the 1960-61 school term as finally approved for 1959-60 upon a motion by Fred Roman, seconded by J. D. Gilmore.

3. Weaver Brown was unanimously approved as a trustee for the Gay Hill CSD #6 to replace Neil Spencer who had resigned, upon a motion by J. D. Gilmore, seconded by Truman Jones.

4. A motion by Truman Jones, seconded by J. D. Gilmore to approve the County Superintendent's claim for office and travel expense in the amount of $229.55 from Feb. 1, 1960 to May 4, 1960, carried unanimously.

5. Next, the Chairman announced that the proposition of annexing the Center Point CSD #7, and Gay Hill Common Consolidated School District #6 to the Big Spring Independent School District under the provisions of Article 2922a, Texas School Law, was to be considered. After considerable discussion and debate by the Board members relative to the merits and advantages versus the demerits and disadvantages of the proposition, the following orders, and, or, resolutions were voted, passed, and adopted:

THE STATE OF TEXAS
COUNTY OF HOWARD

On this the 4th day of May, 1960, the County School Trustees of Howard County, State of Texas, convened in Regular session with the following members present: Robert J. Cook, Chairman, J. D. Gilmore, Fred Roman, James G. Lewis, Truman Jones, and Walker Bailey, County Superintendent and ex-officio Secretary of the Board.
and the following absent: NONE
and a quorum being present, there came on to be considered the question whether Center Point Common School District No. 7, situated in Howard County, State of Texas, should be annexed to Big Spring Independent School District, situated in Howard County, State of Texas, under the provisions of Articles 2922a Et SEQ., Vernon's Texas Civil Statutes (Acts 1925, 39th Leg., p. 204, ch 59, as amended); and

WHEREAS, it is determined that each of said

school districts was validly formed and is now a legally existing school district, that said Center Point Common School District No. 7 has less than 250 scholastic population and that said Big Spring Independent School District has more than 250 scholastic population, and that said school districts are contiguous to one another and both may be included in a common boundary line; and

WHEREAS, the County School Trustees of Howard County, State of Texas, do hereby determine that the annexation of Center Point Common School District No. 7 to Big Spring Independent School District would best serve the interests of the scholastics of both such school districts and of the county as a whole;

THEREFORE, BE IT ORDERED by the County School Trustees of Howard County, State of Texas, that the Center Point Common School District No. 7 be and it is hereby annexed to the Big Spring Independent School District under the provisions of Articles 2922a ET SEQ., Vernon's Texas Civil Statutes (Acts 1925, 39th Leg., p. 204, ch. 59, as amended), and that the name of the school district formed thereby shall be Big Spring Independent School District.

The above order having been read in full, it was moved by Truman Jones and seconded by James G. Lewis that the same do pass, and upon the question being called for, the following members of the County School Trustees voted

AYE: Truman Jones, James G. Lewis and Robert J.

Cook and the following voted NO: J. D. Gilmore and Fred Roman and said motion prevailed.

Robert J. Cook
President, County School
Trustees of Howard County,
State of Texas

Walker Bailey
Secretary, County School Trustees
of Howard County, State of Texas

THE STATE OF TEXAS
COUNTY OF HOWARD

On this the 4th day of May, 1960, the County School Trustees of Howard County, State of Texas, convened in Regular session with the following members present: Robert J. Cook, Chairman, J. D. Gilmore, Fred Roman, James G. Lewis, Truman Jones, and Walker Bailey, County Superintendent, and ex-officio Secretary of the Board.
and the following absent: NONE
and a quorum being present, there came on to be considered the question whether Gay Hill Common Consolidated School District No. 6, situated in Howard County, State of Texas, should be annexed to Big Spring Independent School District, situated in Howard County, State of Texas, under the provisions of Articles 2922a ET SEQ., Vernon's Texas Civil Statutes (Acts 1925, 39th Leg., p. 204, ch. 59, as amended); and

WHEREAS, it is determined that each of said school districts was validly formed and is now a legal-

ly existing school district, that said Gay Hill Common Consolidated School District No. 6 has less than 250 scholastic population and that said Big Spring Independent School District has more than 250 scholastic population, and that said school districts are contiguous to one another and both may be included in a common boundary line; and

WHEREAS, the County School Trustees of Howard County, State of Texas, do hereby determine that the annexation of Gay Hill Common Consolidated School District No. 6 to Big Spring Independent School District would best serve the interests of the scholastics of both such school districts and of the county as a whole;

THEREFORE, BE IT ORDERED BY The County School Trustees of Howard County, State of Texas, that the Gay Hill Common Consolidated School District No. 6 be and it is hereby annexed to the Big Spring Independent School District under the provisions of Article 2922a ET SEQ., Vernon's Texas Civil Statutes (Acts 1925, 39th Leg., p. 204, ch. 59, as amended), and that the name of the school district formed thereby shall be Big Spring Independent School District.

The above order having been read in full, it was moved by James G. Lewis and seconded by Truman Jones that the same do pass, and upon the question being called for, the following members of the County School Trustees voted

AYE: James G. Lewis, Truman Jones, and Robert J. Cook and the following voted NO:

J. D. Gilmore and Fred Roman
and said motion prevailed.

Robert J. Cook
President, County School
Trustees of Howard County,
State of Texas

Walker Bailey
Secretary, County School Trustees
of Howard County, State of Texas

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

* * * * * *

No. 691

* * * * * *

RALPH NEILL, ET AL., *Appellants*

vs.

ROBERT J. COOK, ET AL., *Appellees*

* * * * * *

Statement of Appellees Opposing Jurisdiction and Motion To Dismiss or Affirm

* * * * * *

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

* * * * * *

No.....

* * * * * *

RALPH NEILL, ET AL., *Appellants*

vs.

ROBERT J. COOK. ET AL., *Appellees*

* * * * * *

Statement of Appellees Opposing Jurisdiction

and

Motion To Dismiss or Affirm

* * * * * *

Come now Appellees and file their Statement in opposition to Appellants' Statement as to Jurisdiction and hereby move the Court to dismiss the appeal herein or affirm the decision and judgment of the Supreme Court of Texas, from which decision and judgment the said appeal is taken.

Appellants Were Not Deprived of Due Process of Law

As shown by Appellants' Statement as to Jurisdiction, the actions of which the Appellants complain are the judgments of the Texas courts affirming orders passed by the County School Trustees of Howard County, State of Texas, on May 4, 1960, annexing the Center Point Common School Dist. No. 7 and the Gay Hill Common

Consolidated School Dist. No. 6, both in Howard County, Texas, to the Big Spring Independent School District in Howard County, Texas, under the provisions of Article 2922a, Vernon's Texas Civil Statutes.

These orders clearly concerned the formation of school districts under the general laws of the State of Texas. Article 7, Section 3, of the Texas Constitution (appearing in Volume 2, page 383, Vernon's Constitution of the State of Texas, 1955 Edition), authorizes the Legislature to "provide for the formation of school district by general laws."

On the basis of this Constitutional provision it has been the determination of the Texas courts that there are no vested rights in respect to the territorial boundaries of school districts as originally established and that it is within the province and power of the Legislature to enact statutes providing for the creation or change of the territorial boundaries of school districts without consent of or notice to trustees of such school districts, through the instrumentality of county boards of school trustees. *Prosper Independent School Dist.* v. *County School Trustees,* 58 S. W. 2d 5 (Tex. Com. App.)

It has been the consistent holding of the Texas courts that such statutes, including Article 2922a, do not violate the Constitution of the State of Texas, nor for that matter the due process clauses of the Constitution of the United States. *Stinson* v. *Graham,* 286 S. W. 264 (Tex. Civ. App., writ refused); *Phillips* v. *Minden Independent School Dist.,* 152 S. W. 2d 1114 (Tex. Civ. App.); *Ivey* v. *Keeling,* 15 S. W. 2d 1097 (Tex. Civ. App.), appeal dismissed, 281 U. S. 699, 50 S. Ct. 352, 74L. Ed. 1126.

Indeed, it has been the unanimous decision of the Texas courts since 1926, in response to all attacks for whatever reason, that Article 2922a does not violate any

provision of the Texas Constitution. *Henderson* v. *Miller,* 286 S. W. 501 (Tex. Civ. App., writ refused); *State* ex rel. *Childress* v. *School Trustees of Shelby County,* 150 Tex. 238, 239 S. W. 2d 777; *La Parita Independent School Dist.* v. *School Trustees of Atascosa County,* 281 S. W. 2d 123 (Tex. Civ. App., writ refused, N. R. E.); *Adkins* v. *Rogers,* 303 S. W. 2d 820 (Tex. Civ. App., writ refused, N. R. E.); *McPhail* v. *Tax Collector of Van Zandt County,* 280 S. W. 260 (Tex. Civ. App., writ refused); *County School Board of Angelina County* v. *Homer Common School Dist.,* 291 S. W. 268 (Tex. Civ. App.); *Lee* v. *Leonard Independent School Dist.,* 24 S. W. 2d 449 (Tex. Civ. App., writ refused); *Butman* v. *Jones,* 37 S. W. 2d 840 (Tex. Civ. App., writ refused); *Young County Board of School Trustees* v. *Bailey,* 61 S. W. 2d 130 (Tex. Civ. App.); *County Board of School Trustees of Hale County* v. *Mayfield Common School Dist. No. 22,* 140 S. W. 2d 956 (Tex. Civ. App., writ dismissed, judgment correct); *Wise Common School Dist. No. 2 of Castro County* v. *Castro County School Trustees,* 141 S. W. 2d 1028 (Tex. Civ. App., writ refused).

Decisions of the Supreme Court of the State as to the question of any conflict between the statute and the Constitution of that State in which the validity of the statute is sustained are binding, so that the decisions cited in the preceding paragraph with respect to the validity of Article 2922a under the Texas Constitution have settled that question. *Merchants' & Manufacturers' National Bank* v. *Commonwealth of Pennsylvania,* 167 U. S. 461, 17 S. Ct. 829, 42 L. Ed. 236; *Michigan Central Railroad Company* v. *Powers,* 201 U. S. 245, 26 S. Ct. 459, 50 L. Ed. 744.

It has long been held that municipal corporations are creatures of the State for exercise of the governmental powers entrusted to them and that it rests within the

absolute discretion of the State to determine the number, nature and duration of the powers conferred upon them; that the State may at its pleasure modify or withdraw all the powers granted, may take the property of such corporations without compensation and hold it or vest it in other agencies, expand or contract the territory of the area, unite the whole or any part of such municipal corporation with some other municipality, or even destroy such corporation, and that such may be done without the consent of the citizens thereof or even against their protest; and that although the inhabitants or property owners of such corporations may by such changes suffer inconvenience and their property be lessened in value by the burden of increased taxation, or for other reasons, such inhabitants have no right in the unaltered or continued existence of the corporation or its powers, and that there is nothing in the Federal Constitution which protects the inhabitants from these consequences; that the power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it. *Hunter* v. *City of Pittsburgh,* 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151; *Kelly v. City of Pittsburgh,* 104 U. S. 78, 26 L. Ed. 658.

As to school districts this court has held that there is a similar power in the Legislature, an absolute power to make and change subordinate municipalities, and specifically to create a school district out of other school districts and give such school district title to the school properties within the boundaries of such newly created district without the approval and consent of the inhabitants thereof. *Attorney General of the State of Michigan* ex rel. *Kies* v. *Lowrey,* 199 N. S. 233, 26 S. Ct. 27, 50 L. Ed. 167.

It has been decided by the courts of Texas that the Legislature under Constitutional authority has vested in

the boards of county school trustees of each county the discretion to determine whether annexations should be made under the provisions of Article 2922a. *Board of Dist. Trustees of Lanier Common School Dist. No.* 49, *Cass County,* v. *Board of County School Trustees of Cass County,* 232 S. W. 2d 100 (Tex. Civ. App., writ refused, N. R. E.); *La Parita Independent School Dist.* v. *School Trustees of Atascosa County,* 281 S. W. 2d 123 (Tex. Civ. App., writ refused, N. R. E.); *Adkins* v. *Rogers,* 303 S. W. 2d 820 (Tex. Civ. App., writ refused, N. R. E.); *District Trustees of Campbellton Consolidated Common School Dist. No.* 16 v. *Pleasanton Independent School Dist.,* 362 S. W. 2d 122 (Tex. Civ. App., writ refused, N. R. E.).

However, in addition, those who may be dissatisfied with the actions of a board of county school trustees taken under Article 2922a are given the right of an appeal either to an administrative agency or to the courts of Texas for a determination whether the action taken by the county school trustees has been unlawful, arbitrary, or an abuse of discretion, as a matter of statutory right. *Cook* v. *Neill,* 352 S. W. 2d 258 (Tex. Sup.).

Therefore, there is presented no substantial Federal question on this alleged issue.

Annexation Orders Have Been Validated By Legislature

As pointed out on page 2 of Appellants' Statement as to Jurisdiction the Supreme Court of Texas overruled a motion for rehearing in this cause on July 31, 1963. At that time the decision of the Supreme Court of Texas became final, there was no proceeding pending, and mandates went back to the respective courts to enforce the

decision of the Texas Supreme Court. Notice of Appeal to this court was not filed until October 28, 1963.

On August 23, 1963, Acts 1963, 58th Texas Legislature, page 836, Chapter 318 became effective. This Act is codified and printed as Article 2815g-57, Vernon's Texas Civil Statutes, pages 263-266 of the 1963 Cumulative Annual Pocket Part to Volume 8.

The second paragraph of Section 1 of Article 2815g-57 reads as follows:

> "All acts of the county boards of trustees of any and all counties in rearranging, consolidating, grouping, annexing, changing, detaching and attaching of territory, or subdividing any and all such school districts, or increasing or decreasing the area thereof, or abolishing school districts in any school district of any kind, or in creating new districts out of parts of existing districts or otherwise, and all acts of the governing bodies of any such municipalities in annexing territories to such municipally controlled school districts, are hereby in all things validated."

The only exception to the applicability of this act is contained in Section 4 which provides that the action not apply to litigation pending in any court of competent jurisdiction in this State on the effective date thereof nor to proceedings pending before the County Boards of School Trustees, the State Commissioner of Education, or the State Board of Education on the effective date of the act, or to any district which has been declared invalid by a competent court of jurisdiction. As we have shown, there were no such proceedings pending on August 23, 1963, in any court of this State, nor is there any showing

that there were any administrative proceedings pending questioning the validity of the annexation orders on such date since the opinion of the Texas Supreme Court in *Cook* v. *Neill,* 352 S. W. 2d 258, demonstrates that all administrative appeals have been abandoned by the contesting parties with respect to these annexation orders.

The power of the Legislature to so validate these annexations is shown in *Hodges* v. *Snyder,* 261 U. S. 600, 43 S. Ct. 435, 67 L. Ed. 819.

Therefore, there remains no substantial Federal question concerning the validity of the annexation orders attacked by Appellants herein.

The Appeal Herein Is Without Merit, There Being No Substantial Federal Question Involved

Appellees contend that the record in this case discloses no substantial Federal question and, therefore, this Court is without jurisdiction of this cause. This appears from *Ivey* v. *Keeling,* 281 U. S. 699, 50 S. Ct. 352, 74 L. Ed. 1126, involving the validity of the same Article 2922a involved here and similar orders to those involved here.

It is therefore submitted that Appellees' motion herein to dismiss the appeal or affirm the judgment of the Supreme Court of Texas should be granted.

Wherefore, Appellees pray that this Court refuse to note jurisdiction in this cause and that Appellees' motion to dismiss the appeal or affirm the judgment be granted.

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Proof of Service

I, Guilford L. Jones, Attorney of Record for Appellees, depose and say that on the 17th day of January, 1964, I served a copy of the foregoing statement of Appellees opposing jurisdiction and motion to dismiss or affirm on Ralph Neill, et al, Appellants herein by depositing same in the United States mail box with first class postage prepaid addressed to Counsel of Record at their post office addresses as follows: A. B. Culbertson, 4235 E. Lancaster, Fort Worth, Texas; Simon, Crowley, Wright, Ratliff and Miller and Wayne A. Rohne, 12th Floor Sinclair Building, Fort Worth, Texas, Attorneys for Appellants.

Guilford L. Jones

SUBSCRIBED AND SWORN TO before me at Big Spring, Texas, this 17th day of January, 1964.

Donna Shelley
Notary Public, Howard County, Texas
My Commission expires June 1, 1965.

Office-Supreme Court, U.S.
FILED
FEB 6 1964
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 691

RALPH NEILL, ET AL, *Appellants*

vs.

ROBERT J. COOK, ET AL, *Appellees*

Appeal From The Supreme Court of Texas

BRIEF OF APPELLANTS OPPOSING STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 691

RALPH NEILL, ET AL, *Appellants*

vs.

ROBERT J. COOK, ET AL, *Appellees*

Appeal From The Supreme Court of Texas

BRIEF OF APPELLANTS OPPOSING STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

NOW COME Appellants and file this, their Brief opposing the statement of Appellees opposing jurisdiction and opposing Appellees' Motion to dismiss the appeal or affirm the judgment appealed from and in support thereof, Appellants would respectfully show the Court the following

1.

AUTHORITIES CITED BY APPELLEES NOT PERSUASIVE

The Appellees have failed to show by their Brief that this Court lacks jurisdiction to hear this appeal. They have opposed Appellants' plea for relief on the ground that Appellants have not been deprived of due

process of law. In support of this proposition Appellees cite numerous inapposite cases, all of which are clearly distinguishable on the facts. Many of the cases cited by Appellees were decided under Article 2922a V.A.T.C.S. as it was phrased *prior* to amendments in 1947, 1927 and 1925. Some of the cases cited find support in Article 7 Section 3 of the Texas Constitution as it was written prior to its amendment in 1926.

Appellees place particular emphasis on the case of *Ivey v. Keeling*, 15 S.W. 2d 1097 (Texas Civil Appeals, 1929), appeal denied for lack of a substantial Federal question by United States Supreme Court, 281 U.S. 699, 50 S.Ct. 352, 74 L.Ed 1125 (1930), and its compainion predecessor case *Stinson v. Graham*, 286 S.W. 264 (Texas Civil Appeals, 1926, error refused) for support of their position in this case. Appellants question whether the due process question was squarely presented in either or both of these cases. In the Graham case the Court labored mainly to distinguish its case factually from the case of *Browning v. Hooper*, 269 U.S. 396, 46 S.Ct. 141, 70 L.Ed. 330 (1925) rather than coming to grips with the due process question, if it was actually presented at all. Neither Ivey nor Graham indicates whether or not notice and/or hearing, or the lack of it, was a factor or was challenged in the case.

In the *Ivey v. Keeling* case the Court notes that the Court (the same Court of Civil Appeals) in the *Stinson v. Graham* case in effect held that there was no question presented for review because there had been no

election for the issuance of bonds and no special tax had been levied and the Court could not presume that such an election would be ordered and result favorably to an issuance of bonds. The Court notes that much of the Graham case was dictum and not necessary to a decision in that case. Nevertheless the Court in the Ivey case goes ahead and says that the dictum in the Graham case was proper to the Ivey case and holds that Articles 2922a to 2922l V.A.T.C.S. do not violate either the State or Federal Constitutions. The Court's opinion is insufficient to furnish a basis for determining whether that case is applicable to the instant case. In any event this Court must look to the facts in the instant case to determine if due process has been denied in violation of the Fourteenth Amendment to the Federal Constiution.

In the Ivey case there is more than one ground for decision, the Court noting that the attack on the acts of the County Board of School Trustees amounts to a collateral attack on their action and that the only proper mode of attacking such action would be by quo warranto and not by an ordinary lawsuit such as the one before the Court for review.

It should be noted that Article 2922a V.A.T.C.S. under attack in those cases as well as in the instant case has been amended at least once during the time since the *Ivey v. Keeling* case was decided. Although not discussed in the Ivey case or Graham case, Article 2922a prior to its amendment in 1947 required approval by Boards of Trustees of affected districts before their annexations to another district by a County

Board of School Trustees. After the 1947 amendment and as it reads now, Article 2922a has no requirement that approval be given by Trustees of affected districts prior to their annexation to another district. It is this deficiency, and orders passed pursuant thereto, without notice or opportunity for hearing, which Appellants allege have deprived them of their property without due process of law in this case.

The above considerations are pointed out so that this Court may see that the questions raised in this suit are not controlled by cases cited by Appellees. These cases do, however, demonstrate the callous disregard of basic individual rights denied to Appellants in this case and illustrate better than this brief or any other can suggest the disposition Texas Courts have shown in ignoring the unheeded cries of litigants for due process of law in this class of cases. In other areas Texas Courts have always resolved any issue involving the taking of property in favor of notice and opportunity for hearing. See *Francisco v. Board of Dental Examiners*, 149 S.W. 2d 619, (Texas Civil Appeals 1941, error refused), the Court noting that due process is generally conceded to include reasonable notice and the right to be heard. This is true whether the tribunal exercising jurisdiction over rights or privileges protected by the due process clause be a judicial, legislative, executive or administrative one. " 'The requirements of due process of law extend *to every case* of the exercise of governmental power.' 12 Am. Jur. 283, Section 586." (Emphasis added)

Appellants have sued in the instant case in their

individual capacities as citizens and taxpayers in addition to suing as members of the Boards of Trustees of the Districts in question. The question of the denial of private property rights without due process of law is squarely presented in this case. Some of the cases cited by Appellees, e.g. *Prosper Independent School District v. County School Trustees*, 58 S.W. 2d 5 (Texas Commission of Appeals, 1933), clearly indicate that the litigants in the case were there only in their capacity as public officials. Therefore, such a case has no application to the instant case in which the Appellants sue in their private as well as public capacities. The language of the Prosper Independent School District case finding that the School District in *its corporate capacity* has no vested right in its territorial boundaries has no application here.

In the case of *Love v. City of Dallas*, 40 S.W. 2d 20 (Texas Supreme Court, 1931), the Texas Supreme Court had occasion to discuss the relation between legislative power and school district or other municipal properties and recognized the following to be a correct statement of the law, citing from the case of *Pearson v. State*, 56 Ark. 148, 19 S.W. 499, 35 Am. St. Rep. 91, as follows:

> "The statement that counties and school districts are agencies of the state, and therefore subject to legislative control or annihilation, is a misleading generality. The corporate entity is a legislative creation, and its powers may be restrained, its functions changed, or its existence destroyed at the will of the legislature; but, in so far as it has acquired and holds property, it is but a trustee

> for the local public; and, although its powers be withdrawn or its existence ended, the property which survives it belongs to the same public, and must be, in some way, applied to its use. It has no contract right to exist as a corporation, but the public that it represents has a vested right in the municipal property acquired for its benefit, and is entitled to demand that such property be applied to its uses. 40 S. W. 2d 20, 27.

This case reviews a long line of decisions including *the Dartmouth College Case*, 4 Wheat. 518, 4 L.Ed. 629 (1819), which enunciated the principle that the power of the legislature over the property of corporations purely public was not absolute or unlimited.

2.

UNITED STATES SUPREME COURT NOT BOUND BY STATE COURT DECISION ON QUESTIONS ARISING UNDER FEDERAL CONSTITUTION

A judgment by the Texas Supreme Court that a Statute such as Article 2922a does not offend its own Texas Constitution does not bind the U. S. Supreme Court in its inquiry into whether the State Statute offends the Federal Constitution. This is a new and independent and non-delegable pursuit for the U. S. Supreme Court. It should be noted that in some of the cases cited by Appellees, the Constitutional questions presented were not due process questions, but were questions raising the issue of whether or not Article 2922a was a valid fulfillment of the Constitutional grant of power in Article 7, Section 3 of the Texas Constitution. See *McPhail v. Tax Collector of Van Zandt County*, 280 S.W.

260 (Texas Civil Appeals 1926, error refused); and *County School Board of Angelina County v. Homer Common School District*, 291 S.W. 268 (Texas Civil Appeals 1927, no writ history).

3.

POWER OF ADMINISTRATIVE AGENCY NOT THAT OF LEGISLATURE

The case of *Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151, cited by Appellees at page 4 of their brief, involved an act of the Pennsylvania Legislature authorizing consolidation of certain cities under certain circumstances *after an election* was held on the question. In this case the vote in the election favored the consolidation. But because the Legislature can pass laws consolidating cities does not mean that an administrative body such as a County Board of School Trustees can combine or consolidate school districts. The Hunter case does not indicate any conspiracy on the part of governmental officials to conceal the proposed consolidation and does not outrage one's sense of justice as do the acts complained of in the instant case.

4.

VALIDATING ACTS NOT APPLICABLE

Article 2815g-57 V.A.T.C.S., the validating act cited by Appellees, is not applicable to this case. For one reason the instant case was still "pending" within the meaning of Texas law at the time the act became effective since the time for appeal to the United States

Supreme Court had not expired. See *Texas Company v. Charles Clark & Company*, 112 Tex. 74, 244 S.W. 995 (1922), which holds that the judgment of the Court of Civil Appeals did not become final so long as it was *subject* to review by the Supreme Court.

Section 4 of Article 2815g-57 V.A.T.C.S. making non applicable the provisions of the Act to litigation pending is not "the only exception" (page 6 of Appellees' brief) in the Act as Appellees would have this Court believe. The paragraph preceding Section 4 provides as follows:

> "Sec. 3. Anything to the contrary notwithstanding, this Act shall not be construed as validating any boundary change made or attempted to be made by any ex parte order, resolution or act of the board of trustees of any school district."

Appellants submit that this paragraph expressly governs the instant case, the orders appealed from being ex parte, affecting boundaries in all the districts involved, and made by a board of trustees of a school district which for this purpose is a county-wide school district.

Is Article 2815g-57 V.A.T.C.S. a valid exercise of legislative power? For all of its broad, sweeping terminology, in practical effect and application it is so limited in scope as to be but a species of special legislation dealing with the formation of school districts which violates Article Seven, Section Three of the Texas Constitution. This is a matter only the Texas Courts can determine under Appellees' theory of the

case, being a question arising as to a state statute violating a state constitution.

The question of the applicability of the validating act to the present controversy can not be determined initially by the Supreme Court of the United States. This act has not been found applicable or valid by the State court whose duty it would be to make these initial inquiries.

For the foregoing reasons Appellants submit that Article 2815g-57 V.A.T.C.S. by its own terms is inapplicable to the appeal in this case.

CONCLUSION

In no case cited by Appellees and in no case uncovered by Appellants' research has a court anywhere countenanced the complete disregard of fundamental rights and elements of due process as is manifest in the instant case. Because of the fact that only a small geographic area of rural West Texas is involved in this case, this Honorable Court may not feel inclined to take so small a matter under advisement. Appellants urge, however, that the rights asserted in this case by them are as large as the Constitution of the United States itself and as large as any this Court will have before it for consideration at this or any other term.

WHEREFORE, PREMISES CONSIDERED, Appellants respectfully pray that this Court find that this appeal presents substantial Federal questions requiring plenary consideration with briefs on the merits and oral argument for their resolution, and an ultimate

declaration from this Court that the orders complained of herein are void.

Respectfully submitted,

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PROOF OF SERVICE

I, Wayne A. Rohne, Attorney, of Counsel for Attorneys of Record for Ralph Neill et al, Appellants, depose and say that on the 5th day of February, 1964, I served a copy of the foregoing statement as to jurisdiction on Robert J. Cook, et al, Appellees herein, by depositing same in the United States mail box with first class postage prepaid addressed to Counsel of Record at their post office addresses as follows: Guilford L. Jones, P. O. Box 688, Big Spring, Texas; J. C. Hinsley, 630 Littlefield Building, Austin, Texas, Attorneys for Appellees.

Wayne A. Rohne

Wayne A. Rohne

SUBSCRIBED AND SWORN TO before me at Fort Worth, Texas, this 5th day of February, 1964.

Nell Mitchell

Notary Public in and for Tarrant County, Texas

My Commission expires June 1, 1965

NELL MITCHELL, Notary Public in and for Tarrant County, Texas